IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

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Criminal Appeal No. 611-DB of 2001.
Date of Decision: July 11 , 2006.

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1. Sukhdev Singh son of Sewa Singh son of Ram Singh, resident of Brahamke District Ferozepur.

2. Kirpal Singh son of Tehal Singh son of Maghar Singh, resident of Khosa Randhir, Distict Ferozepur.

Versus

The State of Punjab.

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Criminal Appeal No. 526-DB of 2001.

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Balbir Singh son of Piara Singh son of Bhagat Singh, resident of Village Malak, Tehsil Jagraon.

Versus.

The State of Punjab.

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Present: Shri K.K.Goyal, Advocate, for the appellants.

Shri A.S.Virk, Senior Deputy Advocate General, Punjab.

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CORAM: Hon'ble Mr. Justice K.S.Garewal, and
Hon'ble Mr. Justice R.S.Madan, JJ.

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R.S.Madan,J

By this order, we propose to dispose of two Criminal Appeals bearing No. 611 and 526-DB of 2001, vide which the appellants have been convicted by Shri Baldev Singh, Special Judge, Faridkot, vide order dated 11.09.2001 and sentenced to undergo rigorous imprisonment for twelve years and to pay a fine of Rs.One lakh. In default of payment of fine they were further

ordered to undergo further rigorous imprisonment for two years, under Section 16 of the Narcotic Drugs and Psychotropic Substances Act, (for short hereinafter referred to as the “NDPS Act”).

2. In brief, the facts of the prosecution case which are taken out from the judgment of the trial court are reproduced as under:-

that on 23.04.1994 DSP Narinderpal Singh along with Inspector Jagmohan Singh, ASI Mohan Lal, ASI Dilbagh Singh, ASI Jagdish Rai, HC Surajpal Singh, ASI Ajmer Singh and other police officials was going from Village Kokri Kalan towards Village Jalalabad in connection with the search of terrorists on Govt. vehicle and when the police party reached in the area of Village Kokri Kalan crossing, one truck was seen coming from the side of Jalalabad. DSP Narinderpal Singh and other police officials had taken the positions after alighting from the vehicle. DSP Narinderpal Singh stopped the truck with the help of torch light and they encircled the truck. Balbir Singh accused was driving the truck and accused Kirpal Singh was sitting by his side and Sukhdev Singh accused was sitting on the back of the truck. From the search h of the truck, 125 bags of poppy husk were recovered. They were numbered from 1 to 125. 250 grams of poppy husk was separated as sample from each bag and the remaining on weighment came to be 39.750 grams of poppy husk each. The remaining poppy husk was allowed to remain in the same bags. All the samples were converted into parcels. Each bag and the samples were sealed by the DSP Narinderpal Singh with his seal bearing letters “NPS” and the seal after use was handed over to Inspector Jagmohan Singh. All the sample parcels and the bags were taken into possession vide memo Ex.PD attested by Inspector Jagmohan Singh and Ajmer Singh ASI. From the personal search of the accused Sukhdv Singh, currency notes of Rs.20/- were recovered which were taken into

possession vide memo Ex.PG/1 attested by the abovesaid witnesses. From the personal search of Kirpal Singh noting was recovered and memo Ex.PG/2 was prepared which was thumb marked by the accused and attested by the witnesses. From personal search of Balbir Singh accused, currency notes of Rs.15/- were recovered which were taken into possession vide recovery memo Ex.PG/3 attested by the abovesaid P.Ws and thumb marked by the accused. Truck bearing No.PJI-4475 was taken into possession along with the documents vide memo Ex.PG/4 attested by the abovesaid P.Ws. Grounds of arrest were disclosed to the accused vide separate memos Ex.PE, Ex.PF and Ex.PG thumb marked/signed by the accused. Ruqa Ex.PH was sent to the police station for the registration of the case, on the basis of which formal FIR Ex.PH/1 was recorded by Baldev Singh MHC. DSP Narinderpal Singh prepared the rough site plan Ex.PJ at the spot and recorded the statements of the witnesses under Section 161 of the Code of Criminal Procedure. Thereafter, the Deputy Superintendent of Police entrusted the investigation of the case to Inspector Jagmohan Singh. On return to the Police Station, the accused were lodged in the police lockup. On the same day, Inspector Jagmohan Singh produced the accused and the case property before Shri K.K.Kareer, JHMIC, Moga and on return to the police station the case property was deposited with the MHC. The samples in due course were sent to the Chemical Examiner. After the receipt of the report of the Chemical Examiner Ex.PK and completion of necessary investigation into the case, the accused were challaned.

3. On appearance of the accused before the learned Special Judge, a prima face case under Section 15 of the NDPS, Act was found to be made out against the accused and they were charged thereunder. The charges framed by the trial court are reproduced as under:-

"That on 23.4.1994 in the area of Village Kokri Kalan, you all the accused were found in possession of 125 bags of poppy husk containing 40 kilograms of poppy husk each and you thereby committed an offence punishable under Section 15 of the N.D.P.S.Act, 1985 and within my cognizance.

And I hereby direct that you all be tried by this Court on the abovesaid charge.

Sd/- Addl:Sessions Judge,
24.12.1997.

"Certified that the contents of the charge have been read over and explained to the accused in Punjabi, which have been understood by them".

To bring home the guilt of the accused, the prosecution relied upon the statements of PW-1 HC Gurjant Singh and Constable Kulwant Singh to prove the link evidence and they have tendered in evidence their affidavits Ex.PA and Ex.PB, respectively. Similarly Shimla Devi is also a formal witness, who has proved the registration of Truck bearing No. PJI-4475 in the name of Ajit Singh son of Major Singh C/o Gurdip Transport Company, Jeor Sarak, Ludhiana and also proved Ex.PC, the photocopy of the relevant entry of the register. Jagmoahn Singh DSP and Narinderpal Singh, SP (H), were examined as PW4 and PW-5, respectively. They have partly investigated the case and arrested the accused with the case property. Thereafter, the prosecution tendered into evidence the report of the Chemical Examiner, Ex.PK and closed the evidence of the prosecution.

4. After the evidence of the prosecution was closed, the accused were

examined in terms of statement, under Sections 313 of the Code of Criminal Procedure in which the entire incriminating evidence appearing against the accused was put to them to which they pleaded innocence and claimed that they were brought to the police station from their house house in the presence of respectable and after illegal detention this case was planted upon them. Jasbir Kaur wife of Kirpal Singh had given telegram in this regard. The accused preferred to lead evidence in defence and examined Manjit Singh son of Joginder Singh, DW-1, Madan Lal, Record Keeper of the Court of District & Sessions Judge, Faridkot as DW-2 to prove the copy of the bail application Ex.DA and Jasbir Kaur wife of Kirpal Singh as DW-3 and after tendering into evidence certified copy of the bail order closed the defence evidence.

5. After carefully considering the evidence of the prosecution and the defence evidence, the learned Special Judge passed the impugned order convicting and sentencing the accused-appellants as mentioned above.

6. We have heard Shri K.K.Goel, learned counsel for the appellants, Shri A.S.Virk, Senior Deputy Advocate General, Punjab and have carefully gone through the evidence and the other materials brought on the record.

7. It was frankly conceded by the learned counsel for the appellants that the provisions of Section 50 of the NDPS Act are not applicable in this case because the recovery of offensive goods was effected from the truck by the investigating officer. However, the learned counsel for the appellants has challenged the case of the prosecution on the ground that the prosecution has failed to prove that the accused were in conscious possession of the contraband allegedly recovered from them. Once the conscious possession of the contraband stuff is not proved, it cannot be easily said that the recovery of the poppy husk in the present case relates to the accused. In support of his

contention he placed reliance upon reference was made to a Full Bench Decision of this Court in case **Kashmir Singh Versus State of Punjab and Karam Singh Versus State of Punjab, Criminal Appeals No. 407 and 408-DB of 1999,** the Full Bench has dealt in detail with Sections 35 and 54 of the N.D.P.S.Act and observed that unless the accused is put in the statement under Section 313 Cr.P.C., that they were in conscious possession of the contraband, the order of conviction and sentence can not be recorded against the accused. It is the fundamental right of the accused to know the case of the prosecution to enable him develop his defence.

> "It has been further observed that in any prosecution for an offence under the Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that `prosecution, as provided in Section 35 of the Act. For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability".
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> Section 54 reads as under:-
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> "Presumption from possession of illicit articles- In trials under the Act, it may be presumed, until and until the contrary is proved, that the accused has committed an offence under this Act in respect of--
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> (a) any narcotic drug or psychotropic substances or

controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any material which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,

for the possession of which he fails to account satisfactorily".

8. The learned counsel for the appellant referred to the judgment of the Supreme Court in **Madan Lal and another Versus State of H.P. 2003, Supreme Court Cases (Crl.) 1664,** wherein it was held as under:-

" The word "possession" means the legal right to possession. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different back grounds. Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or

control".

" The word "conscious" means awareness about a particular fact. It is a state of kind which is deliberate or intended".

"Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles".

At the end of this judgment, the Full Bench further observed that the accused is to be given an opportunity to rebut the presumption as envisaged in Section 313 of the Code of Criminal Procedure.

9. Admittedly, in the instant case, the accused have not been asked any question with respect to the presumption of conscious possession as envisaged under Section 313 Cr.P.C. Therefore, they have not been afforded any opportunity to enable them to develop their defence.

10. To strengthened his arguments, the learned counsel contended that in fact the accused were not the owners of the contraband stuff as from their personal search they were found to be in possession of currency notes of Rs.20/- and 15/- respectively, which were taken into possession by various recovery memos. Had the contraband poopy husk been in possession of the accused persons, they would have some money with them to meet the exigencies they may come across while carrying the offensive goods or importing

the offensive goods from one place to other.

11. According to the learned counsel even if the accused have been found carrying the aforesaid offensive contraband stuff in the truck on the date, they cannot be held guilty for the commission of the crime because no alternative charge under Section 8 of the Act for transporting the offensive goods was framed against the accused.

12. Learned counsel for the appellants next contended that Section 8 of the NDPS Act deals with the Prohibition of certain operations, which reads as under:-

> (a) cultivate any coca plant or gather any portion of coda plant; or
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> (b) cultivate the opium poppy or any cannabis plant; or
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> (c) Produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any Narcotic drug or psychotropic substance,

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in case where any such provision, imposes any requirement by way of licence, permit or authorization also in accordance with the terms and conditions of such licence, permit or authorization:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official

Gazette, specify in this behalf;

(Provided further that nothing in this Section shall apply to the export of poppy straw for decorative purposes).

13. Learned counsel for the appellant stated that the accused should have been alternatively charged for transportation of the offensive goods without permit or authorization, as required by law but no such alternative charge was framed in the instant case. Therefore, this infirmity in the prosecution case continues to exist. The accused have also not been put any question in this regard in their statements under Section 313 of the Code of Criminal Procedure. Therefore, the order of conviction recorded by the learned Special Judge, is not sustainable. Reference was made to **Avtar Singh Versus State of Punjab, 2002(4) RCR (Criminal) 180** wherein in paragraph 7 of the judgment, their lordship of the Supreme Court observed as under:-

> " Coming to the case of the third appellant who was driving the vehicle, there is one more infirmity in the prosecution case. He would have charged alternatively for transporting the offensive goods without permit or authorization as required by law; but such a charge was not laid. There was not even reference to Section 8 of the Act. The result is, he too goes scot free".

14. So far as the accused-appellants are concerned, they have not been charged under Section 8 of the Act, in the alternative. Therefore, in the absence of any charge under Section 8 of the Act and the statement of the accused under Section 313 Cr.P.C., they cannot be held guilty for any offence as they have not been afforded any opportunity to defend themselves.

15. Another limb of arguments of the learned counsel for the appellants was that the case property produced in the court, during trial, did not bear any identification mark so as to prove that the case property which was produced in

the court during the trial was the same which was alleged to have been recovered from the possession of the accused. Therefore, the finding of the learned trial Court that no prejudice is caused and being the huge recovery, cannot be termed to be a case of plantation, is not sustainable. In the cross examination, the investigating officer, Shri Jagmohan Singh, Deputy Superintendent of Police, appearing as PW-4, admitted that the bags are in torn condition and have no identification or particulars of the case. On this ground as well a dent is created in the prosecution version.

16. We found force in the contention of the learned counsel. Once the case property which is produced before the Court , it was incumbent upon the prosecution to prove by adducing cogent and convincing evidence that the case property is the same which was recovered from the accused on the date when they were apprehended by the police.

17. On the other hand the learned Senior Deputy Advocate General, Punjab contended that it is a case where the accused have been actually found to be in possession of the goods in the area of Village Kokri Kalan and they could not account for the possession of the offensive goods. Hence, it is only the accused who can be treated to be in actual possession of the offensive goods.

18. After carefully considering the submission of the learned counsel for the parties, it is not disputed that no alternative charge has been framed against the accused was envisaged under Section 8 of the Act for transporting the offensive goods. It is also not disputed that no question was put by the prosecution to the accused, with respect to conscious possession of the contraband, when they were examined under Section 313 Cr.P.C., that they were transporting the offensive goods in the vehicle at the relevant time. Thus in the absence thereof, the accused cannot be held guilty for the commission of

any crime.

19. In the light of the foregoing discussion and keeping in view the facts and circumstances appearing in this case, it is held that the prosecution has miserably failed to bring home the guilt of the accused, beyond any shadow of doubt.

20. In the net result, this appeal is accepted giving the benefit of doubt to the accused-appellants. The order of conviction and sentenced passed against the accused-appellants by the Special Judge, Faridkot, the accused are acquitted of the charge framed against them, is set aside. They are discharged from the bail bonds furnished.

(R.S.MADAN)
JUDGE

(K.S.GAREWAL)
JUDGE

July 11 , 2006.
Malik